No. 3753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY (a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL, co-partners doing business under the firm name of COMYN, MACKALL & COMPANY,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error.

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It is to be regretted that in this case of such general importance to the export shipping interests, the court should not have had the benefit of full oral argument. As may be remembered the forty-five minutes allowed the writer was entirely inadequate for the presentation of defendant's contentions and we believe much labor would have been saved the court in this important case, had both counsel been unrestricted in argument as to time.

I.

THE DELIVERY DATE CONDITIONED BY THE NAMING OF THE "W. H. MARSTON".

Our contention that the naming of the "W. H. Marston" conditioned the delivery date of the lumber sold as her cargo, and, therefore, was a provision of the contract for the benefit of the seller which could not be waived by the buyer alone,—was answered by the suggestion, that as the contract imposed upon the buyers the duty of furnishing the seller with specifications for that vessel's cargo,—the law would give the seller a reasonable time after the receipt of such specifications within which to cut and prepare the lumber for delivery. We submit, that this ingenious argument does not answer our contention. There is no need, under the contract in suit, for the application, of the *reasonable time* principle to the cutting or preparation of the specification lumber, except in the improbable situation where the furnishing of such specifications is delayed to such an extent as to embarrass the mill. As for instance, if the furnishing of the specifications is so delayed as to make it impossible for the mill to cut the lumber in time for its delivery to the vessel which *has arrived* before the expiration of the agreed delivery date,—the principle would then probably apply. But such a situation does not answer the contention that the *arrival* of the named vessel within the agreed loading period, fixes the commencement of the delivery date, and that the time of such arrival can be approximated by the seller through sources which are independent of the buyers, and that for the buyers to deprive the seller of

this means of ascertaining the time, in advance, when it will be called upon to meet its obligation; is to take from it an important and valuable benefit given by the contract.

The provision of the contract relative to specifications has nothing whatever to do with the delivery date of the cargo. Specifications may be furnished even before the commencement of the 90-day delivery period, without effecting in the least the delivery date. They *must* be furnished within a reasonable time before such period actually begins to run, but the time of its commencing to run, is established solely by the arrival of the named vessel within the agreed loading dates. We find in the record no basis for, or confirmation of, Counsel's inventive suggestion. His client, Mr. Comyn, who is a manufacturer of lumber, whose experience extends to the furnishing of export cargoes under contracts calling for named carrying vessels, does not seem to appreciate the attempt which is being made to connect the time of furnishing the specifications with the ascertainment of the time of the commencement of the delivery: *"60 M feet per working day or pay demurrage as provided by charter party"* (Record page 85). On the contrary, Mr. Comyn's testimony fairly and clearly substantiates our contention as to the value to the seller of naming a vessel whose actual arrival within the agreed period, fixes the time when the loading lay days are to commence. He testified:

> "It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber.

The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f.a.s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we found a vessel was going to be late, we have taken one out of order and put it in. *It enables your mill to keep circulating right."*

(Italics ours. Record pp. 153, 154.)

This last sentence: *"It enables your mill to keep circulating right,"* confirms our belief that the export cargo business could not be carried on as it now is and has been for years, were it not that the naming of the vessel which is to take delivery, *alone makes it possible,* as a practical business operation, for the seller to allow the buyer an optional date, extending over a period of from three to six months, within which to demand delivery of the named vessel's cargo. A most unusual option. By agreeing upon a certain specific vessel, both buyer and seller are placed upon an equal footing as to the actual date of delivery, for the time when such vessel shall arrive at the agreed loading port is as open to ascertainment by the seller as the buyer. The vessel's arrival is in the nature of a public fact which can be as equally approximated by the one as by the other

through the published information of the vessel's exact movements. Specifications may be furnished months before the vessel arrives, but the mill can only know when they are to be cut, through its knowledge of the date when the vessel will arrive. In the case at bar, the specifications for the "W. H. Marston's" cargo were furnished to the defendant on September 19, 1917, though the vessel did not arrive until some time in May, 1918 (she was loaded with her substituted cargo at Dant & Russell's mill in the latter part of May, 1918, with the same specification lumber called for by the specifications furnished defendant in September, 1917. Dant & Russell's contract for the "W. H. Marston's" cargo was dated December 7, 1917, and the instant suit was filed December 27, 1917, four days before the expiration of the 90-day delivery period called for by the contract (Record pp. 160, 165).

Mr. Dant, plaintiff's witness, also differs with counsel as to the value to the seller of naming a carrying vessel in contracts providing for long optional delivery dates. Mr. Dant testified:

> "Our contracts where we have named a sailing vessel to carry the cargo, with the expectation that she will carry it, generally provide for some long period, which we will call the delivery. They usually do, such as 60, 90, 100 or 120 days. The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.
>
> Mr. McClanahan. Q. This order, then, with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in

such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

Witness (continuing). They can find out when they will be called upon approximately to furnish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the "Guide". The "Guide" is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the "Guide" and find out approximately where that vessel is and then approximate when she will be due at the loading port. *That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready."*

(Italics ours. Record pp. 122, 123.)

And again:

"I suppose that the naming of a vessel in a f.a.s. contract gives to the seller some measure of assurance as to when he will have to cut that lumber. In a sale made under "G" list by the Douglas Fir Exploitation & Export Co., the naming of an export vessel gives to the seller some measure of assurance *that the lumber will be exported."*

(Italics ours. Id. page 134.)

Mr. Baxter, defendant's general manager, in enumerating the benefits accruing to the defendant through the naming of the "W. H. Marston" as the vessel to which delivery of the cargo was to be made, testified:

"Second, it would permit us through the shipping papers, to keep track of the vessel's move-

ments and know approximately when she would arrive."

* * * * * * *

"The trade papers I have spoken of are shipping papers. They give the position of the vessel on any given day, how many days she is out from one port to another port, or that she is in such a port. Contracts of this character, where the delivery date extends over a period of 90 days, give us the means of knowing in advance when the mill will be called upon to cut the lumber, and we instruct the mill."

(Record pp. 226, 227.)

The importance to the seller of knowing in advance the approximate time when the delivery of the cargo is to commence, in contracts for cargoes cut to given specifications, where long delivery periods are given, is universally recognized by both buyers and sellers, and the record in the case at bar shows other contracts where the plaintiffs *negotiated especially* so as to be *relieved* from the established practice. As for instance, see plaintiff's letter of September 1, 1917, to the Charles Nelson Co. relative to the purchase of cargoes for the schooners "R. R. Hind", "Encore" and "Jas. H. Bruce", where the special *"privilege"* is asked, in certain contingencies, of substituting other vessels, or *barges,* for the three named vessels *"to take delivery of the quantity of about 2,000,000 feet"* (Record p. 305). See, also, plaintiff's later letter of September 5, 1917, in which the purchase is expressly conditioned on the understanding that the cargoes for the named vessels may be *"taken delivery of"* on *barges,* in case the named vessels do not make their loading dates. The

argument used by plaintiffs in support of the granting of the privilege demanded, is interesting and important.

> "If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading dates, *you would be at liberty to abrogate the contract,* * * *".

(Plaintiff's Ex. No. 31, Record pp. 306, 307.)

It is futile, in face of the record in the case at bar, to contend that the naming of a specific vessel to take delivery of the lumber sold as her cargo, in a contract such as the one in suit, does not condition the time of said cargo's delivery and is a provision of benefit to the seller which the buyer cannot defeat without the seller's consent.

II.

THE SIGNIFICANCE OF THE LETTERS OF NOVEMBER 6th and 8th, 1916.

(Defendant's Exs. "F" and "G", Record pp. 157, 158.)

It will be remembered that this was the correspondence wherein plaintiffs asked the privilege, which was denied, of substituting other vessels for the "W. H. Marston" and "W. H. Talbot", in certain contingencies. Counsel, in argument, suggested that when his clients asked that they be given the right of substituting other vessels for the "W. H. Marston" and "W. H. Talbot", they were doing a vain and unnecessary thing as they had such right anyway as a matter of law. Answering this contention, we submit, that however the law *may have been,* governing the construction of the

initiatory letter of November 2, 1916, had plaintiffs' letter of request of ~~Sept~~ Nov ember 6, 1916, *not been written;* there can be no doubt as to the situation *after* that letter had been written and the request *refused.* Under *such* circumstances, the subsequently accepted contract must be read as if it contained an express prohibition against the right of substitution. After the refusal of the request, plaintiffs accepted and approved of the document consummating the contract, namely the "Acknowledgment of Order", dated December 8, 1916, and under such circumstances they would have been estopped from asserting the right which had been denied them, assuming they had such right before the request was refused, which we by no means concede.

Furthermore, we point out that again counsel and his client differ, as is shown by the latter's dealings, at that time, in the purchase of other cargoes of lumber. On October 29, 1917, plaintiffs received from the Charles Nelson Co. a letter relative to the sale of cargoes for the three named vessels and the closing paragraph of this letter is significant as showing that the substitution of a barge for a vessel was a recognized *privilege* to be had *only through the consent of the seller,* as is also the substitution of one named vessel for another.

> "We beg to say that you have the privilege of putting in barges for these cargoes in the event of any or all of these vessels being late, but this does not give you the privilege of substituting the Schr. 'H. D. Bendixen' for the Schr. 'Encore', and to which we cannot agree. It is up to you to take delivery by the Schr. 'Encore' and if not, then by barges."
>
> (Record p. 303.)

The brief and argument for defendants in error deal with this case as if a shipment by a specified vessel was not important or a condition precedent to the consummation of the transaction. The question is asked, what difference did it make to the seller how the cargo was shipped, or whether it was shipped at all, if the purchase price was paid and delivery accepted? This question ignores the issue now before this court, which is, what did *these parties* intend by their agreement? What anyone may at this time conclude was or was not beneficial or harmful to either of the parties is quite immaterial. The case must be controlled by what the parties at that time agreed should be their rights and obligations. They had perfect freedom to place in their contract, if they so desired, an iron-clad stipulation to the effect that the cargo must go by a specified vessel or there would be no sale. There would have been nothing against public policy in such a stipulation, and, therefore, the only question now is whether they did so agree.

It is submitted that the letters of November 6 and 8 conclusively answer this question. They are entirely clear and unambiguous. The question of the substitution of a vessel for the "W. H. Marston" had been raised and definitely decided in the negative, before the time for the delivery of the lumber in question had expired (Court's Finding No. 3, Record p. 54). The buyers, from the time that they received the letter of November 8, knew that the seller had definitely and finally stated that the presence of the vessel in question was a condition precedent to the sale. They had

made no objection to this. Thus the parties had themselves agreed to an interpretation of this contract, before the question at issue here arose, which positively made the presence of the "W. H. Marston", as specified in the contract, a condition precedent to the sale.

The significance of export by a particular vessel is illustrated by the character of the business conducted by the defendant. This business was an *export* business entirely. Defendant did not and could not, within the terms of its charter, make sales of lumber to be used in the United States. Its corporate powers were confined to sales for export.

When the defendant, therefore, entered into a contract for the sale of lumber, it was its duty to confine its obligations to those which it was legally entitled to perform. The designation of a particular seagoing vessel rather than a barge was all-important to the seller, so that it would know that its corporate powers were not being exceeded by a sale for domestic use. Surely a company which is incorporated for the purpose of export trade only has not only the right, but it is its duty, to throw every possible safeguard around its sales, so as to make certain that its corporate powers will not be exceeded. The seller was willing to rely upon the assurance of the buyers that this lumber would be exported to Australia, *provided that that assurance was reinforced by the actual presence alongside the wharf of a deep-water vessel chartered for Australia.* The seller was not willing to rely upon the assurance of the buyers without the presence of this

vessel (and he would have been so obligated had the lumber been delivered upon a barge), because, if so placed upon a barge, and all dominion over the lumber lost by the seller, then the lumber might never have been exported.

It is no answer to this position to say that the *title* to the lumber passed within the State of Washington. The seller has the right to stipulate that the thing sold shall be sent to a particular place even although title has passed.

III.

THE PROVISION IN THE "ACKNOWLEDGMENT OF ORDER", DATED DECEMBER 8, 1916, READING:

"Notes: This price is for delivery F.O.B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash." (Record p. 83).

In speaking of this provision, counsel intimated that the writer's failure to discuss it in his argument was attributable to something other than lack of time. Counsel is mistaken. Not only this provision, but a number of other subjects of vital importance were not spoken of because of a lack of time, and while they are covered in our opening brief, still, had argument been made on them, we believe it might have been helpful to the court.

The particular provision now in question is discussed in our opening brief, commencing at the middle paragraph on page 75 and ending at the bottom of page 79. The contention there made is that plaintiffs at this late

date are attempting, in face of the record to the contrary, to construe the provision as a *"price term"*, so as to be relieved of the embarrassment of the situation if it is held to be an optional mode of delivery reserved by the seller.

Our theory of the cause of this litigation rests upon the belief that when the contract in suit was brought to the attention of opposing counsel, after Messrs. Comyn, Mackall & Co. had been advised on September 20, 1917, that the "W. H. Marston" would probably be unable to make her loading date and that if she did not, the contract would not be carried out at the old $9.50 rate; his advice was, that this provision of the "Acknowledgment of Order" *expressly* gave to the buyers the right *to take delivery* of these cargoes either f.o.b. (free on board) the mill wharf and/or on barges, at their option. The allegations of the complaint which was subsequently drawn and filed bears out this theory, as do all the steps taken by plaintiffs after September 7, 1917, the date of their letter to the defendant, in which the provision in question is attempted to be paraphrased as follows:

> "We will take delivery of this lumber f.a.s. mill Wharf Knappton and/or on barges a.s.t. mill wharf Knappton in the month of December."
>
> (Plaintiffs' Ex. No. 10, Record p. 95.)

Had this provision been correctly construed, we doubt very much whether the failure to secure the "W. H. Marston's" cargo would have been litigated, any more than was the failure to secure the cargo for the "Wm. Bowden", the other vessel which did not make her de-

livery date, and which carried the same loss under documents indentical with those of the "W. H. Marston". This, for the reason that at the very time we assume that plaintiffs sought legal advice on their rights, they knew definitely that in similar contracts, with other sellers, providing for cargoes for named carrying vessels, the buyer is always recognized as having no right to substitute barges in case the named vessel fails to make her loading date, *unless such right was expressly and plainly given by the contract* (see closing paragraph of plaintiffs' letter of September 5, 1917, to the Chas. Nelson Co., Plaintiffs' Ex. No. 31, Record p. 306). Counsel's construction, therefore, of a provision of the contract which his clients had always before understood to be an option reserved by the seller giving him two ways of making the delivery, must have been an agreeable surprise, which was well worth adopting,—at least in the case of *one* of the defaulting vessels, considering that lumber had risen in value from $9.50 to $22.00 per M feet. Hence, this suit and hence, Mr. Comyn's attempt in his testimony to adopt his counsel's construction, that the provision in question gives to the buyers the right to take delivery on barges. "We decided to take this lumber on barges immediately after he (Mr. Baxter) refused to deliver it to the ship" (Comyn, Record p. 156). And right here it is of interest to read Mr. Comyn's testimony touching the provision in question, the value of which to the seller, is further explained by Mr. Baxter (Record, middle of page 228 to and including first nine lines on page 229).

"When they reserve the right to make delivery on both sides of the vessels, from barges and from the mill wharf, the mill is not delivering to that ship. They are bringing it from some other mill. I have never had a mill reserve the right to make delivery to the ship from both sides of the vessel, from the mill wharf, and from the barges in the water. The lumber is always delivered on the mill wharf, but if it came from a man who had more than one mill, I would say yes, it might be done. I have known of mills reserving that right. I have known the selling agent for a number of mills to do that. That does not always mean that the seller of the lumber reserves the privilege of making delivery from both sides of the ship, one delivery from the mill wharf and one delivery from barges on the other side of the vessel, it means he could deliver them any way he wanted to. He could deliver by barges under these conditions if he wanted to, if that was in the contract. *If it is in the contract, it reserves to the seller the right of making deliveries from either side from other mills.* It means that it comes from another mill. He would not load that off his dock on to a lighter and bring it around to the other side of the ship, because he would simply be throwing away money; he would bring it from some other mill on a lighter. He has that privilege. If he reserves it, that would give it to him. *It would give him the right to make a double delivery.* There would be no objection whatever, provided the ship could handle it. The term 'a.s.t.' is a new one in the trade. As I understand it, they have had it in only since the Douglas Fir was put in. That is what they call 'at ship's tackle', which is an unknown term in the trade. The clause, 'This price is for delivery f.o.b. mill wharf, Knappton, within reach of vessel's tackles, and/or on barges a.s.t. mill wharf', refers to the price. It most assuredly does. It says price. It is only a matter of price. It means that the price is for

> delivery on mill wharf or on a barge, if they want to bring it by barges. It is to cover the cost of their barges. If they bring it along in barges they have to pay the cost of the barges."
>
> (Comyn, Record pp. 143, 144. Italics ours.)

This testimony is somewhat contradictory, because the witness is evidently trying to help counsel's *"price term"* contention and at the same time is unable to avoid giving expression to what he knows to be the true reason for the provision, namely, that it gives to the furnishing mill the right of making a double delivery in case of necessity—one from the mill wharf to the vessel and/or from barges on the vessel's other side. This latter lumber coming from other mills called into action by the seller to expedite the delivery, and thereby avoid paying demurrage.

The subject of this provision of the contract is discussed in our opening brief (Brief, pp. 75-78), and we cannot do better here than to repeat the question asked there:

> "How can plaintiffs assert a right to receive on barges, *with the 'W. H. Marston' not present*, and yet preserve to defendant the right to *make* delivery on barges, at that vessel's tackles, Mill Wharf?"

It is perfectly obvious that plaintiffs' exercise of a right to ignore the "W. H. Marston" and *take* delivery themselves on barges, destroys defendant's right to *make* delivery to the vessel f.o.b. mill wharf and/or on barges a.s.t. mill wharf. The *place* of delivery of the "W. H. Marston's" cargo was already clearly fixed by the contract of November 2, 1916, in these words:

> "Cargo to be furnished f.a.s. vessel at loading ports" (Record p. 68),

while the *mode* of such delivery is made optional with the seller by the provision of the "Acknowledgment of Order" of December 8, 1916.

The big facts of this controversy have always seemed to us most significant in considering the construction of this contract: The purchase of four cargoes of lumber for *named vessels,* under the same contract, at $9.50 per thousand feet; a rise in the market to $22.00 per thousand feet before the expiration of the delivery date; two of the vessels reach their loading ports before the expiration of the agreed loading time and receive their respective cargoes; the two remaining vessels fail to reach their respective loading ports at the agreed time and lose their right to cargoes; the buyers bring suit to cover their loss on only *one* of the two defaulting vessels. Had the buyers' right of recovery been based on any clear legal or equitable ground, can it be doubted that they would have brought suit to cover the loss on *both* defaulting vessels? Furthermore, if there is merit in their contention that the subject matter of the purchase was 3,500,000 feet of lumber, and not four cargoes, can any reason be suggested for the failure to sue for the whole loss, being the difference between the amount of lumber received of the 3,500,000 feet and the amount they failed to receive?

IV.

COUNSEL'S CONTENTION THAT THE SUBSEQUENT NEGOTIATIONS OF THE PARTIES IN THE CASE OF THE SCHOONER "WM. BOWDEN" IS EVIDENCE SUPPORTING PLAINTIFFS' CONTENTION THAT THE SALE, AS APPLICABLE TO THE "W. H. MARSTON", WAS OF 1,300,000 FEET OF LUMBER 15%, MORE OR LESS, AND WAS NOT THE SALE OF A CARGO FOR THAT VESSEL.

The phase of this controversy as to what is the subject-matter of the sale, is a vital one, and is entirely independent of the other questions relating to the *benefits* to the seller, which accrued through the naming of a specific exporting vessel (see our opening brief pp. 85-90). If it should be held that not a single benefit accrued to the defendant through the naming of the "W. H. Marston", nevertheless, if the subject-matter of the sale was a *cargo* for that vessel and not a specified number of feet of lumber,— then, of course, it is clear that the subject-matter of the contract cannot be changed by one party without the consent of the other. This important matter is discussed in our opening brief (Brief pp. 46-70), and cases are there cited, which we urge upon the court's careful consideration. The testimony shown by the record is practically all to the effect that if this is a sale of a cargo for the "W. H. Marston", the expression of the contract "1,300,000 15% more or less to suit capacity of vessel", is nothing more than an estimate of the parties as to what the "W. H. Marston's" cargo should be and is given for the purpose of informing the seller of the approximate amount of lumber it will be called upon to furnish for said cargo.

The plaintiff, Mr. Comyn, as well as Mr. Baxter, representing the defendant, both give their understanding as to the meaning and practicable effect of this term of the contract. Mr. Comyn testified:

> "The object of putting into our contract 'to suit the capacity of the vessel' is just what it states—to suit the capacity of the vessel. Practically it works out that the vessel is completely loaded. When it is completely loaded the contract is fulfilled. If the contract is for that particular vessel, it is fulfilled. Fifteen per cent more or less does not apply if the vessel is at the mill. *If it is a contract for a particular vessel, the contract is fulfilled when the vessel is loaded, if the contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract,* if it is a contract for a cargo by the vessel."
>
> (Italics ours. Record pp. 151, 152.)

Mr. Baxter testified:

> "In f.a.s. cargo contracts there is inserted a definite number of feet with the expression 15% more or less to suit capacity of vessel, to allow a leeway that is estimated sufficient to load the vessel that may later be named. The estimate is determined by the parties as a mutual agreement between buyer and seller."
>
> (Record pp. 247, 248.)
>
> "The naming of the definite number of feet is an approximation of the cargo that the parties make themselves."
>
> (Id. 248.)
>
> "The expression '15% more or less to suit capacity of the vessel' means to give the vessel a full and complete cargo."
>
> (Id.)

> "I said this morning that a contract for 1300 M feet 15% more or less to suit capacity in which a vessel is named, is a contract for a full cargo for that vessel, regardless of how much she might take. The purpose of putting in 1,450,000 or 1,300,000, more or less, is merely an estimate between the buyers and the seller that neither objects to, as to what the capacity of the vessel is."
>
> (Id. 270, 271.)

> "In fact, the estimated quantity put in there, 1300 M, means nothing more to us than it would have meant had we omitted it, and just said a full and complete cargo for the 'Marston', which is the same."
>
> (Id. 271.)

Counsel's attempts to discredit this clear and harmonious view of plaintiffs and defendant as to the practicable meaning and effect of this term by referring to their treatment of the "Wm. Bowden". This was one of the two vessels which the letter of November 2, 1916, required the buyers later to name. The other was the schooner "Golden Shore". The "Golden Shore" was named first on February 28, 1917 (Record p. 149), her specifications were furnished and the vessel was loaded within the agreed loading time, which will be remembered was October to December, 1917. The *Acknowledgment of Order"* for the "Golden Shore", executed and approved before she was named, called for a cargo of one-half of 1450 M, or *"725,000 feet, 15% more or less to suit capacity of vessel"* (Record, Plaintiffs' Ex. No. 6, p. 86). The *specifications* for the "Golden Shore" called for two lots of lumber, one of 276,002 feet, and one for 551,979 feet, this last lot to be loaded last.

Combined, these two lots amounted to 827,981 feet, which exceeded one-half of 1450 M, plus 15%, by over 30,000 feet. When thereafter the "Wm. Bowden" was named, defendant objected because the "Wm. Bowden's" maximum cargo if added to the "Golden Shore's", would exceed the contract requirement, which as to the two vessels "to be named", called for cargoes whose combined capacities was to be 1450 M 15% more or less. On receipt of the specifications for the "Wm. Bowden" cargo, defendant wrote to plaintiffs the following letter:

"San Francisco, August 17, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'William Bowden'

We acknowledge your favor of the 16th inst., with specification for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450 M, which is interpreted to mean, as usual, 1450 M, 15 per cent more or less, and as you have already named the 'Golden Shore' for one cargo and now name the 'Bowden' for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450 M plus 15 per cent, at the present market price, namely, $20 base 'G' list, less 2½% and 2½% for cash.

Please send us the charter-party, in duplicate, for the 'William Bowden.'

Written in duplicate—please approve and return one copy for our files.

Very truly yours,
Douglas Fir Exploitation & Export Co.,
By A. A. Baxter,
General Manager."

(Record, pp. 172, 173.)

The requirements of this letter were promptly accepted by plaintiffs, but the "Wm. Bowden" was never loaded, because she, like the "W. H. Marston", failed to make her loading date, and plaintiffs' contention that the instant contract was a sale of a specific number of feet lumber (3,500,000 feet or 3,750,000 feet, we are not clear for which amount plaintiffs contend), is not assisted by the fact that no demand or claim *was ever made* on defendant for the "Wm. Bowden's" lumber, in the amount of 725,000 feet, 15% more or less, or any other amount.

The contention now made is that the letter just quoted is contradictory of defendant's contention that the subject matter of the sale was four cargoes and not the aggregate of the specific amount estimated by the parties as the capacities of the four vessels.

We submit that Mr. Baxter's explanation of the reason he demanded the then market price of $20.00 for the *excess* over 1450 M plus 15%, the estimate of the cargoes for the two vessels "to be named",—is logical and entirely in harmony with the claim, that as far at least as the "W. H. Marston" is concerned, a cargo to suit her capacity was a part of the subject matter of the contract. The market was a rising one and there-

fore the buyers' interest lay in securing all the lumber they could get at $9.50, but in doing so, they are charged with the necessity of preserving good faith, and had they designated as the "to be named" vessels, two whose combined capacities reached several millions of feet, they clearly would have been open to the charge of bad faith. Good faith in their selection of the "to be named" vessels was obviously required and under the circumstances of a rising market, they could not legally include in their purchase two vessels whose combined cargoes would exceed 1450 M feet plus 15%. In naming the "Wm. Bowden", however, this is precisely what they did do and it is to their credit that when the matter was called to their attention, they promptly recognized the justice of Mr. Baxter's construction and acceded to it.

The record makes the situation perfectly clear:

> "The 'William Bowden' was one of the unnamed, or one of the to-be-named vessels in the contract. The 'Golden Shore' was one of the to-be-named vessels in the contract. I required of Comyn & Mackall an addition over the agreed $9.50 base for the 'William Bowden's' cargo, because I had sold him two cargoes for vessels that were named, and 1,450,000, 15 per cent more or less, for two vessels unnamed, that was the combined capacity of the two vessels to be named. When he named the two vessels, their capacity was greater than 1,450,000 plus 15 per cent, and it was therefore mutually agreed that he should pay us our then current price for the excess above 1450 M plus the 15%. If the 'William Bowden' and the 'Golden Shore' had been named in the contract, and their estimated cargo had been fixed at 1450 M feet combined, I would not have demanded the current rate of the com-

bined cargoes then exceeding 15% because the vessels having been named in the contract I would feel under an obligation to give them a full cargo and consider the contract filled, regardless of whether it exceeded or was below the amount estimated, even if it exceeded the 15%."

(Record, Baxter p. 231.)

And again on his cross-examination, Mr. Baxter explains the equity of his contention:

"I will tell you why we demanded of Comyn, Mackall & Co. that they should pay us for the excess that the 'Bowden' and 'Golden Shore' were going to carry in excess of 15%, $20 base price, instead of $9.50. They are two entirely different cases. In the case of the 'Marston' I sold him the cargo for the 'W. H. Marston'. It was estimated at 1,300,000 feet 15% more or less, but had she taken 25 or 30 per cent more or less, I was under an obligation to furnish her a full cargo. In the other case I sold him 1,450,000 feet to be lifted by two of his vessels to be named, 15% more or less to suit their capacity. Now, it was evidently his intention, and my expectation at the time the contract was made, to name two vessels within that range. When he named the first vessel, she took considerably over half of it—I forget her name now. When he named the second vessel, she would exceed the contract, and, had I accepted that vessel without protest as coming within that range, I then would have been under an obligation, probably, to furnish it, but immediately he named the second vessel, she, taken in conjunction with what the first vessel had loaded, exceeded the amount I sold him. But that was a case where it was not a named vessel at the time of the contract, but he agreed to name two vessels to me, the capacity of the two combined to be 1,450,000, 15% more or less, and for the excess he had no contract, and I gave it to him at the greater price. He did have such a contract for the excess

> on the 'Marston' and on the 'Talbot', because they were named at the time of the sale. He really had two contracts, one for the 'Marston' and 'Talbot', for anything they might carry, and the other for two vessels to be named later, being the exact quantity that he specified, 15% more or less. That is the way the contract works out. It gets that result. That is my interpretation absolutely of this contract for four cargoes."
>
> (Id. p. 272.)

In closing our reply to counsel's argument based on these negotiations for the "Wm. Bowden's" cargo, we cannot do better than refer again to the words of the Supreme Court in *Brawley v. United States,* cited at page 66 of our opening brief:

> "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less', or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, *in reference to which good faith is all that is required of the party making it.*"

On the general question of the subject matter of the instant sale, we submit that it is difficult to know plaintiffs' exact position. There are indications in the record that their claim is that the subject matter of the sale was 3,500,000 feet, the amount called for by the old cancelled contract with the Charles Nelson Co.; there are

also indications that their claim is for 3,750,000 feet, the aggregate of the estimates of the four cargoes called for in the instant contract. As a matter of fact, that part of the contract which was carried out, namely: the furnishing of the cargoes for the "W. H. Talbot" and the "Golden Shore", shows that while plaintiffs furnished to defendant specifications for only 930,000 feet for the "W. H. Talbot's" cargo, the vessel was actually loaded with 971,974 feet, and this amount added to the "Golden Shore's" cargo, say of 827,981 feet, makes a total of 1,799,955 feet, as the amount of lumber plaintiffs received under their contract which they claim called for 3,500,000 feet or 3,750,000 feet. If 1,300,000 feet claimed by plaintiffs in the present suit be added to the amount already received by them, the total is 3,099,955 feet. On plaintiffs' contention therefore, what has become of the difference between what they have received and now claim, call it 3,099,955 feet, and what the contract calls for as they now construe it? Why was this suit not brought for the difference between what they had received and the amount which they claim their contract called for? Is it not perfectly clear, under the circumstances, that plaintiffs' instant suit is for damages for failure to deliver a cargo to the "W. H. Marston"? We submit that otherwise their conduct is inconsistent with their claim.

In speaking of the 1,300,000 feet of lumber for the "W. H. Marston", plaintiff Comyn testified:

> "We had a purchaser for the lumber at that time. The *cargo* was sold."
>
> (Record p. 156.)

This fact alone, we submit, is conclusive of the question of what the subject matter was of the instant sale. If *"the cargo was sold"*, it was a *cargo* which was *purchased* for that sale and not a given number of feet, the exact amount of which could never be known until the vessel was actually loaded. Dant and Russell, competitors of defendant, loaded the "W. H. Marston" eventually with this cargo which was sold and it amounted to 1,314,000 feet (Comyn, Record p. 166). Had the subject matter of the instant sale been 1,300,000 feet, there would have been no necessity for making the agreement read "15% more or less", for the specifications for the lumber footed up exactly 1,300,000 feet (see specifications for "W. H. Marston", Record p. 40).

V.

THE SIGNIFICANCE OF WHO WAS RESPONSIBLE FOR THE NAMING OF THE VESSELS IN THE CONTRACT.

Counsel's argument pointed to the contention that the naming of the four vessels was a matter in which the plaintiffs were solely interested. Here again it is difficult to square his contention with the view of his client, for it was perfectly clear at the trial that Mr. Comyn did his best to convey the impression that Mr. Baxter was responsible for naming the "W. H. Marston" and the other vessels in the contract. Mr. Comyn on this point is undoubtedly right in part. Of course, the plaintiffs held the charters for these vessels and must have so advised Mr. Baxter, and of the fact that they were to be used, but on the other hand, it is perfectly clear

that the Douglas Fir Exploitation & Export Co. could only sell the lumber for export and it would have been the height of folly for it to make a sale and not provide some assurance of the lumber being exported by the buyer. The naming of an exporting vessel as the direct receiving medium for the lumber's exportation, or securing the agreement of the buyers to later name such a vessel, would be a necessary precaution *in every contract the defendant should make,* and certainly the present one was no exception. It is significant in this connection to know that though the Charles Nelson Company contract did not expressly name an exporting vessel, but purported to be simply the sale of 3,500,000 feet of lumber, for export (Plaintiffs' Ex. No. 2, Record p. 71), the contract in suit, which was supposed to take its place, called expressly for four cargoes for four specifically named or to be named vessels, and the preparation of the writing constituting the contract which showed this, was the work of the defendant. The following testimony on this point given by Mr. Comyn, is highly significant:

> "In this particular matter it was not the intention originally that this should be a cargo for the 'W. H. Marston'. I did not say just a little while ago that it was. The original intention was that we bought 3,500,000 feet, 15 per cent more or less.
>
> Mr. McClanahan. Q. I mean when you signed this contract on November 2d, that was your intention then, to load that on the 'W. H. Marston', to suit her capacity?
>
> A. It was put in there by Mr. Baxter."
>
> (Record p. 152.)

(The witness had just previously testified: "When this letter was signed, initiating the contract, I was intending to use the 'W. H. Marston' for a part of the purchase." Record p. 150.)

Again this witness testified:

> "Our position in this case is that we purchased one parcel of lumber, and not four cargoes. We made no distinction between any of the vessels. The object of putting into the contract the name of any vessel was because Mr. Baxter put it in. We did not. The object of our consenting to its being put in was that it came written in that way, and my Australian Department passed it as it came in. I mean to say absolutely that Mr. Baxter originated the idea."
>
> (Record pp. 149, 150.)

Perhaps he did, but we know the Douglas Fir Exploitation & Export Company would never have signed the contract otherwise.

VI.

THE REDUCTION OF THE JUDGMENT BY FIFTEEN PER CENT.

We think that counsel wholly failed to meet our contention on this point, namely, that, even on the lower court's construction of the contract in suit, the judgment must at least be reduced by 15%.

In our opponent's brief all of the cases cited by us on this point are commented on, *except the most important of all* (which we referred to at length)—*Thornett & Fehr v. Yuills,* 26 Com. Cas. 59, decided by the Lord Chief Justice of England.

All of the cases cited in counsel's brief are readily distinguishable on their facts. It is sufficient to cite the language of *De Grasse Paper Co. v. Northern N. Y. Coal Co.,* 179 N. Y. S. 788, on this point. The court there says:

> "Construction of a contract of sale calling for a minimum and maximum of the article sold, as to which of the parties has the right to exercise the option, depends very largely upon the facts and circumstances surrounding each contract. It would be useless to try and lay down any general rule."

We also refer to the following cases on this subject holding the option to be generally with the seller:

Wheeler v. New Brunswick Ry. Co., 115 U. S. 29; 29 L. Ed. 341;

Dupont Powder Co. v. United Zinc Co., 89 Atlantic 992;

De La Pierre Co. v. Chicago Lumber Co., 71 So. 872;

Am. Hardwood Lumber Co. v. Dent, 132 S. W. 320.

In the case last cited the seller, a lumber company, was under contract to cut and sell "at least 500,000 feet and not to exceed 1,000,000 feet" of specified lumber of different dimensions (as in the case at bar). In a suit by the buyer for breach of contract, the court held that the discretion as to the amount to be delivered was with the seller and limited the damages to the failure to deliver the minimum. The court said:

> "Therefore, for the purpose of fixing the damages, the kind of lumber on which the damage would

> be least should be selected, and the amount on which it is to be computed should be fixed at 500,000 feet, the minimum amount to be furnished under the contract."

Almost all of the cases hinting at a contrary view are from one jurisdiction—New York—and even there, the rule is qualified, as shown above.

We are astonished that plaintiffs should now contend that the words *"to suit capacity of vessel"* not only (a) do not make the sale a sale of a cargo, but also (b) operate to qualify the words "15% more or less". This is going very far indeed (unless, as we contend, the sale *was* a cargo sale). It seems to us plain that the words *"15% more or less to suit capacity of vessel"*, even if they do not require the presence of the vessel (as we contend they do), *at least* give the defendant the option of delivering only the minimum quantity. The failure to produce the vessel was the act of the buyers and not of the seller and the buyers should not be accorded a possible advantage by reason of this failure. The suggestion that the "Marston's" capacity was "practically" 1,300,000 (Brief p. 73) is substantiated *only* by what she carried under the Dant & Russell contract in the *Spring* of the year. Under the contract in suit, however, she would have loaded in the late Fall or Winter and would have carried less (see evidence of plaintiff Comyn himself, Record p. 125).

Finally, in *all* of the cases cited, where maximum and minimum quantities are named, the option to take one or the other is always *somewhere*—either with the seller or the buyer.

There is *no case* supporting plaintiffs' contention that any *fixed* quantity must govern. This being so, the option in *this* case *must* have been with the seller, because the failure to produce the named receiving medium was solely that of the buyers.

The dispute into which the parties have fallen as to this simple subject shows clearly that what was actually sold was a *cargo for the "W. H. Marston"*. That eliminates any such disputes and it was certainly a *benefit* to the seller that such disputes *should* be eliminated. Plaintiffs' argument on this one point, in our opinion, completely demolishes the case they have so laboriously built up in attempting to vary the plain terms of the contract.

We believe our opening brief is sufficiently clear on the remaining contentions as to the value to the defendant in naming specific vessels as the carrying mediums at whose tackles their respective cargoes may be delivered, either from the wharf itself and/or from barges alongside the vessels at the mill wharf, at the seller's option. Although in Judge Van Fleet's decision on our *demurrer to the complaint,* it is held that the provision as to the delivery of the lumber at the ship's tackles was one for the benefit of the buyer alone and therefore could be waived by them; we submit that in view of Judge Van Fleet's later ruling on plaintiffs' *demurrer to our answer,* there is strong ground for the contention that the court's first ruling was not intended to go so far as to touch the question of the necessity of the *vessel's* pres-

ence at the loading dock. This question being again directly raised by plaintiffs' demurrer to the answer, Judge Van Fleet's ruling *then* was in defendant's favor and defendant was thereafter allowed to show as a matter of defense the absence of the "W. H. Marston" during her agreed loading time. Also it is important to remember, that the expressions "at ship's tackles" and "within reach of vessel's tackles", appear *only* in the paragraph of the contract which solely reserves to the *seller* the optional mode of the cargo's delivery.

In conclusion we again submit, (a) that in f.a.s. ("free alongside, within reach of ship's tackles", see "G" List, page 2, copy of which important exhibit in the case was furnished to each member of the court at the oral argument) contracts, where specific vessels are named as the receiving mediums for the lumber sold, the law is well settled that the named vessels must be present to receive delivery at the agreed date and place; (b) that in the instant contract the subject matter of the sale was four cargoes and that the term "15% more or less to suit capacity of vessel", coupled with the term "1300 M" applying to the "W. H. Marston" and "1000 M" applying to the "W. H. Talbot" and "1450 M" applying to the combined capacities of the two vessels to be named, —were but estimates of the amount of the respective cargoes; (c) that the naming specifically of the vessels to which cargoes were to be furnished, suiting their capacities, conditioned the *time,* the *place* and the *quantity* of the lumber sold, which a barge or barges could not do, and moreover was a guarantee and assurance to the seller that the cargoes for the named vessels

would be *exported* and that therefore the sale was one which the defendant could legally make. Moreover, as the contract clearly provides, not only for a *delivery,* but for a *shipment* of the lumber between October 1st and December 31st, 1917 (see "Acknowledgment of Order": "Time of Shipment—October to December, 1917"), it is obvious that a delivery to *barges* to await the "W. H. Marston's" belated arrival at another season of the year (May, 1918), as contended for by plaintiffs, when her carrying capacity might be different, would not meet this condition. The agreement of the parties that the *shipment* also should be made within the agreed time is a condition precedent, the failure of which relieves the seller from making delivery.

Mechem on Sales (1901), Vol. I, Sec. 653.

The question involved in this litigation is of vital importance and this fact is our excuse for this extended discussion which we will now close with a brief distinguishment of the cases cited by counsel. *Meyer v. Sullivan, Ellsworth v. Knowles* and *Harrison v. Fortlage* we have already distinguished (Opening Brief pp. 14, 15, 41-44).

The case of *Neill v. Whitworth,* L. R. 1 C. P. 684, cited by counsel, is obviously not in point, for in that case "the defendants offered to deliver it to them at quay weights and *even to cart it back to the quay free of expense*" (18 C. B. at p. 442); or, in other words, to make delivery exactly at the place specified in the contract. In view of the above quoted fact, a great deal of the opinion is pure dicta. As applied to the particu-

lar facts in that case the dicta may be correct, but certainly the case comes far from overruling *Wackerbarth v. Masson* or *Wetherell v. Coape* cited by us in our opening brief (Opening Brief pp. 33, 34).

It is to be particularly noted that in *Wackerbarth v. Masson,* Park, counsel for the defendant, unsuccessfully urged exactly the contention urged by plaintiffs here, but the court held that the buyer, as well as the seller, was bound by the mode of delivery named in the contract.

The cases of *Thornton v. Simpson,* 2 Marsh 267, and *Reade v. Meniaeff,* 7 C. B. 159, deal with contracts for shipment of goods from Russia by an unnamed ship, and, as a matter of *construction,* it was held that this did not confine the shippers to *one* vessel, and that they could ship by several.

We fail to see how these cases bear any analogy to the case at bar. If plaintiffs in the case at bar had offered another vessel in place of the "W. H. Marston", the cases might have some application, although we doubt whether as a general principle it can be said that, in circumstances analogous to those of the case at bar, another vessel can be substituted for a *named* vessel.

In *Bourne v. Seymour,* 16 C. B. 349, defendant contracted to sell plaintiff "about 500 tons" of nitrate of soda, and the contract stated that it was "understood" that said cargo was to constitute a full cargo of the ship "John Phillips", but, if she was unable to prosecute the voyage, *then another vessel could be used.* The "John Phillips" was not large enough to carry the

entire cargo, and it was decided that plaintiff could recover for the difference. The court held that the contract was for "about 500 tons" rather than a complete cargo for the "John Phillips". This was a pure question of *construction,* as in the last two cases cited, and we fail to see wherein it is in point in this case. The fact that another vessel besides the "John Phillips" was authorized by the contract, shows clearly that the sale was not intended necessarily as a cargo for the "John Phillips".

None of plaintiffs' cases are in any way similar to the case at bar, and none of them constitute any authority against applying the doctrine of the f.o.b. cases cited by us beginning with *Wackerbarth v. Masson.*

Dated, San Francisco,
November 7, 1921.

Respectfully submitted,

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Plaintiff in Error.